

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Joint Application by SWBT Communications, )  
Inc., Southwestern Bell Telephone Company, )  
and Southwestern Bell Communications )  
Services, Inc., d/b/a/ Southwestern Bell )  
Long Distance for Provision of In-Region, )  
InterLATA Services in Arkansas and Missouri )

CC Docket No. 01-194

**MOTION OF AT&T CORP.  
FOR LEAVE TO FILE COMMENTS IN EXCESS OF ONE HUNDRED PAGES**

Pursuant to the Commission's *Notice*,<sup>1</sup> AT&T Corp. ("AT&T") respectfully seeks leave to file comments on SBC's joint application for Arkansas and Missouri of 108 pages in length. This length exceeds the Commission's one hundred (100) page limit for single-state applications by eight (8) pages. In its *Notice*, the Commission stated that it "retains discretion to extend the page limit, upon request, if a commenter requires additional pages to address circumstances specific to Arkansas or Missouri." *Notice* at 2. The additional pages are needed so that AT&T can address certain pricing, Track A, and public interest issues unique to Arkansas alone. The Arkansas-specific discussion adds at least twelve (12) pages to the balance of AT&T's comments, which pertain either exclusively to Missouri or generally to both Missouri and Arkansas, and which thus falls well within the 100-page single-state limit. AT&T also notes that the applicant's brief in support of the joint application, to which AT&T is responding, was

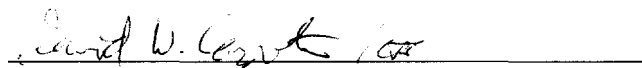
<sup>1</sup> Public Notice, *Comments Requested on the Application by SBC Communications Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA*

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168 pages in length, significantly in excess of the Commission's 125-page limitation for single-state briefs.<sup>2</sup> For these reasons, AT&T respectfully submits that the modest extension of the page limits requested here is warranted.

Respectfully submitted,



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September 10, 2001

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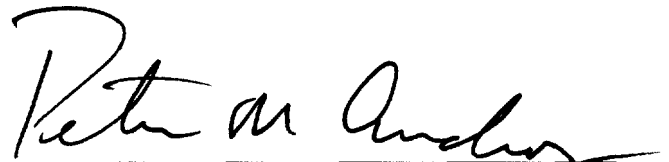
*service in the States of Arkansas and Missouri, CC Docket No. 01-194, DA 01-1952 (Aug. 10, 2001) ("Notice").*

<sup>2</sup> See Public Notice, *Updated Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, DA-99-1994, at 4 (September 28, 1999).

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of September, 2001, I caused true and correct copies of the forgoing Motion of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: September 10, 2001  
Washington, D.C.

A handwritten signature in black ink, appearing to read "Peter M. Andros", written over a horizontal line.

Peter M. Andros

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OFFICE OF THE SECRETARY

## REDACTED – FOR PUBLIC INSPECTION

**Re: Application by SBC et al for Provision of In-Region InterLATA  
Service in Arkansas and Missouri, CC Docket No. 01-194**

Dear Ms. Salas:

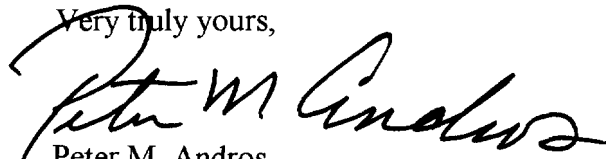
Enclosed for filing please find the Comments of AT&T Corp. in connection with the above referenced matter. Pursuant to the Public Notice issued August 20, 2001, AT&T is submitting the original and two (2) copies of its comments and supporting exhibits in redacted form.

AT&T is also submitting under seal the portions of supporting exhibits that contain material designated as confidential pursuant to the Protective Order in this matter. These pages bear a legend indicating that they are confidential.

AT&T also hereby incorporates by reference all of its filings from CC Docket 01-88 into the record of this docket pursuant to the Public Notice (at 1-2).

Please let me know if any additional information is required. Thank you.

Very truly yours,

  
Peter M. Andros  
Legal Assistant

Encl.

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InterLATA Services in Arkansas and Missouri )

CC Docket No. 01-194

**COMMENTS OF AT&T CORP.  
IN OPPOSITION TO SBC COMMUNICATIONS, INC.'S  
SECTION 271 APPLICATION FOR ARKANSAS AND MISSOURI**

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## FCC ORDERS CITED

SHORT CITE	FULL CITE
<i>Connecticut 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon New York, Inc. et al., for Authorization to Provide In-Region InterLATA Services in Connecticut</i> , CC Dkt. No. 01-100 (rel. July 20, 2001)
<i>Depreciation Order</i>	Report and Order, Memorandum Opinion and Order, <i>1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers, United States Telephone Association’s Petition for Forbearance from Depreciation Regulation of price Cap Local Exchange Carriers</i> , CC Docket No. 98-137, ASD 98-91 (rel. December 30, 1999)
<i>Intercarrier Compensation Order</i>	Order on Remand and Report and Order, <i>Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic</i> , CC Docket Nos. 96-98 and 99-68, (rel. April 27, 2001)
<i>Inputs Order</i>	Tenth Report and Order, <i>Federal-State Joint Board on Universal Service and Forward-Looking Mechanism for High Cost Support for Non-Rural LECs</i> , 14 FCC Rcd. 20156 (1999)
<i>KS/OK 271 Order</i>	Memorandum Opinion and Order, <i>Joint Application of SBC Communications, Inc., et al, for Provision of In-Region InterLATA Services in Kansas and Oklahoma</i> , CC Dkt. No. 00-217 (rel. Jan. 22, 2001)
<i>Line Sharing Order</i>	Third Report and Order, <i>Deployment of Wireline Service Offering Advanced Telecommunications Capability</i> , CC Dkt. No. 98-147 and Fourth Report and Order, <i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i> , CC Dkt. No. 96-98, 14 FCC Rcd. 20912 (1999)

<i>Local Competition Order</i>	First Report and Order, <i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i> , 11 FCC Rcd. 15499 (1996), <i>aff'd in part and vacated in part by Iowa Utils. Bd. v. FCC</i> , 120 F.3d 753 (8th Cir. 1997), <i>aff'd in part and rev'd in part by AT&amp;T Corp. v. Iowa Utils. Bd.</i> , 119 S. Ct. 721 (1999)
<i>Louisiana II Order</i>	Memorandum Opinion and Order, <i>Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana</i> , 13 FCC Rcd. 20599 (1998)
<i>Massachusetts 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Massachusetts</i> , CC Dkt. No. 01-9 (rel. April 16, 2001)
<i>Michigan 271 Order</i>	Memorandum Opinion and Order, <i>Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan</i> , 12 FCC Rcd. 20543 (1997)
<i>NY 271 Order</i>	Memorandum Opinion and Order, <i>Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York</i> , 15 FCC Rcd. 3953 (1999)
<i>Oklahoma I</i>	Memorandum Opinion and Order, <i>Application by SBC Communications, Inc., Pursuant to Sections 271 of the Communications Act of 1934, as Amended. to Provide In-Region InterLATA Services in Oklahoma</i> , 12 FCC Rcd. 8685 (1997)
<i>Second Advanced Services Order</i>	Second Report and Order, <i>Deployment of Wireline Services Offering Advanced Telecommunications Capability</i> , 14 FCC Rcd. 19237 (1999)
<i>South Carolina 271 Order</i>	Memorandum Opinion and Order, <i>Application of BellSouth Corporation, et al Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in South Carolina</i> , 13 FCC Rcd. 539 (1997)

<i>Texas 271 Order</i>	Memorandum Opinion and Order, <i>Application by SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas</i> , 15 FCC Rcd. 18354 (2000)
<i>UNE Remand Order</i>	Third Report and Order, <i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i> , 15 FCC Rcd. 3696 (1999)

#### **MISCELLANEOUS PLEADINGS CITED**

<i>DOJ KS/OK Eval.</i>	Evaluation of the United States Department of Justice, <i>Joint Application of SBC Communications, Inc., et al, for Provision of In-Region InterLATA Services in Kansas and Oklahoma</i> , CC Dkt. No. 00-217 (Dec. 4, 2000)
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**APPENDIX TO COMMENTS OF AT&T CORP. IN OPPOSITION TO  
SBC's SECTION 271 APPLICATION FOR MISSOURI**

**CC Docket No. 01-88**

<b>EX.</b>	<b>DECLARANT</b>	<b>SUBJECT(S) COVERED</b>
A	Michael Lieberman	Margin Analysis; Relative Rate/Cost Comparisons; Declining Loop & Switching Costs
B	Michael R. Baranowski	Evaluation of SWBT's Cost Studies and TELRIC
C	Rebecca DeYoung	Performance Remedy Plan
D	Scott L. Finney	Advanced Services – Resale and Line Sharing Obligations
E	Walter W. Willard & Mark Van De Water	Operations Support Systems

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**CC Docket No. 01-194**

**COMMENTS OF AT&T CORP.  
IN OPPOSITION TO SBC COMMUNICATIONS, INC.'S  
SECTION 271 APPLICATION FOR ARKANSAS AND MISSOURI**

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these comments in opposition to the application of SBC Communications, Inc., *et al.* ("SWBT") for authorization to provide in-region, interLATA services in Arkansas and Missouri.

**INTRODUCTION AND SUMMARY**

There is no meaningful local competition for residential customers in either Arkansas or Missouri. Although numerous CLECs have established interconnection agreements with SWBT, and although some now offer facilities-based service to business customers, none has succeeded in offering local service broadly to residential customers. SWBT's data show that only 1.55% of residential lines in Missouri, and only 0.75% of residential lines in Arkansas, are served by a facilities-based carrier other than SWBT, and that only 0.10% of residential lines in Missouri, and 0.53% percent of residential lines in Arkansas, are served by UNEs. Even resellers have captured less than 5% of the Arkansas residential market, and less than 2% in Missouri.

SWBT's joint application thus presents, at bottom, a single fundamental question: in the presence of continuing barriers to meaningful local residential competition, should the Commission authorize a BOC's long distance entry? It should not. The record confirms that SWBT's non-compliance with checklist obligations and anticompetitive conduct are responsible for the dearth of competition. To grant SWBT's application now would solidify SWBT's monopoly control over the residential market in Missouri and Arkansas, and allow SWBT to extend that monopoly into the long distance market – precisely the result Section 271 is designed to preclude.

The looming injury to competition is not speculative. The findings of the Texas Public Utilities Commission ("TPUC") earlier this year confirm the anticompetitive consequences of premature interLATA authorization for a BOC. The TPUC found that "monopoly power exists . . . in residential and rural markets in Texas," and is likely to continue because large and small CLECs alike have reduced or eliminated their residential service in Texas. Report to the 77<sup>th</sup> Texas Legislature, "Scope of Competition in Telecommunications Markets in Texas (Jan. 2001) at 83, 55-58, 80-81 (Att. 1) (*TPUC Report*"). As a result, SWBT is now insulated from competition for its bundled service offerings, and able to attract hundreds of thousands of customers while raising rates for both local and long distance service. *Id.* at 62-64, 79, 81.

The outcome in Arkansas and Missouri, if SWBT's application were granted, would undoubtedly be far worse. For in Texas, competitors have made enormous sunk investments in local competition, and have learned that residential competition is unsustainable without truly cost-based UNE rates and a level playing field for access to OSS and advanced services. In Arkansas and Missouri, UNE rates are higher still, and no competitive carrier has

sunk significant capital. SWBT's monopoly over bundled services in these states would be invulnerable from day one. And as in Texas, once SWBT's unique bundle of local and long distance services were made available, consumers would quickly see the price of that service rise. The only way to avoid remonopolization of the residential market is to deny SWBT long distance authorization until such time as it has truly opened its local markets to competition, so that numerous competitors can offer consumers the benefits of one-stop shopping.

The remainder of these comments discusses the ways in which SWBT's continuing checklist non-compliance and anticompetitive conduct obstructs competitive entry in Arkansas and Missouri. Part I of this brief addresses SWBT's failure to set cost-based prices for unbundled network elements in Missouri and Arkansas. It was clear when SWBT withdrew its first Missouri application that its Missouri UNE rates were not cost-based. The record showed that SWBT's Missouri UNE-rates were higher than other SWBT states with similar costs, were based on non-TELRIC cost studies, and precluded competitive residential UNE-based entry.

SWBT's renewed application addresses *none* of these fatal flaws. SWBT still defends the same flawed cost studies, and its rates are still too high to support competitive entry. And SWBT's Missouri rates continue to exceed rates in other SWBT states with similar costs. As MPSC Commissioner Gaw recently noted, it is "striking . . . [that] Missouri's rates are higher than the rates just volunteered by SWBT to Arkansas – a state that is more rural and with more difficult terrain than Missouri."<sup>1</sup>

The only difference is that SWBT has now unilaterally reduced a handful of its inflated rates. The Commission cannot determine whether these selective reductions solve the

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<sup>1</sup> Concurring Opinion of Commissioner Steve Gaw, *Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996*, Case No. TO-99-227 (Aug. 30, 2001) ("Gaw Concurrence").

problem, however, because SWBT has denied the Commission and commenters electronic access to its cost studies. As a result, the Commission cannot determine even the rough magnitude of the rate inflation caused by the many TELRIC violations in SWBT's cost studies, and therefore has no non-arbitrary basis to determine whether SWBT's arbitrary discounts to selected rates in fact reduce those rates to the level that application of TELRIC methodology would produce. And because SWBT's TELRIC violations inflated *all* of SWBT's UNE rates, SWBT's discounts to only *some* of its rates is clearly insufficient.

A further problem SWBT leaves unaddressed is that the costs of the facilities that SWBT uses to provide UNEs have fallen dramatically since its cost studies were completed. For example, SWBT's Missouri switching investment costs have fallen by 23 percent since 1996. SWBT has not reduced its UNE rates to reflect these substantial cost savings. SWBT intends its arbitrary rate reductions to offset only the rate inflation caused by its failure to adhere to TELRIC in 1997, not the rate inflation caused by subsequent reductions in forward-looking costs. SWBT's failure to reduce its UNE rates to reflect these cost savings is simply another reason why SWBT today is not providing UNEs at cost-based rates.

In Arkansas, it is SWBT's non-recurring charges that present the clearest TELRIC violation. The Arkansas Public Service Commission ("APSC") adopted SWBT's Kansas UNE-rates without any independent review. But the record in Kansas clearly demonstrates that those nonrecurring rates are inflated by many TELRIC violations. The Kansas Corporation Commission ("KCC"), after reviewing SWBT's nonrecurring charges, identified a number of errors, and ordered SWBT to submit new rates that corrected the errors and reduced the "overstated" rates accordingly. SWBT instead chose to submit *higher* rates which, the KCC expressly found, did not correct the TELRIC errors it had identified. Nevertheless, to meet its



public commitment to support SWBT's 271 application, the KCC accepted SWBT's proposals for many nonrecurring UNE charges and arbitrarily reduced others, without determining that any of the rates were cost-based, thus precluding any finding that these non-recurring charges comply with TELRIC.

Part II demonstrates that the performance assurance plan and performance measurements on which SWBT relies are inadequate to ensure that SWBT will comply with its Section 271 obligations in the future. SWBT asserts that its Missouri and Arkansas performance remedy plans are sufficient because they are essentially carbon copies of its Texas remedy plan previously approved by the Commission, and because SWBT has complied with that plan in Texas. In fact, SWBT's Texas performance monitoring and enforcement mechanisms have proven to be anything but self-executing. SWBT has improperly withheld liquidated damages payments that should be automatically triggered by noncompliant conduct, failed to implement measures and pay damages ordered by the TPUC, ignored or unilaterally modified the express provisions of the plan, and undermined the Section 271 compliance monitoring process by insisting that any order emanating from the six month review has no binding effect absent SWBT's concurrence or separate arbitration proceedings subject to rights of appeal.

In short, SWBT's blatant refusal to comply with the plain terms of its enforcement plan have made a mockery of this Commission's reliance on that plan in the *Texas 271 Order*, and demonstrate precisely why it so important to competition that an effective plan that truly binds a BOC's conduct be in place *before* section 271 relief is granted. Because SWBT promises to repeat in Arkansas and Missouri its anticompetitive conduct in Texas, its joint application should be denied.

Part III addresses SWBT's failure, in two important respects, to satisfy its checklist obligations regarding advanced services. First, SWBT is violating its obligation under checklist item (xiv) and Section 251(c)(4) to resell advanced services. SWBT admits that it still bills end-users directly for DSL as a stand-alone service, yet refuses to resell DSL to CLECs. That action alone violates the checklist.

Equally egregious, however, is SWBT's strategic effort to evade its obligation to allow competitors to resell DSL by taking steps to stop providing DSL transport at retail. As a matter of economics, it makes sense for SWBT to offer DSL transport at retail, and the only reason SWBT has stopped marketing this service to new customers is to avoid its resale obligation. That itself is anticompetitive, exclusionary conduct.

SWBT compounds the problem, however, because it has no intention of becoming a pure wholesaler of DSL, dealing only at arms-length with unaffiliated Internet Service Providers ("ISPs"). Rather, SWBT insists on continuing to provide DSL transport to its own affiliate, which then markets the combined DSL transport and Internet access service to the public. SWBT then presents itself to consumers and Wall Street as the world's leading DSL provider, and offers consumers a combination of local and advanced services that competitors cannot effectively replicate, while telling competitors and this Commission that it is merely a humble wholesaler of DSL. And by refusing to provide unaffiliated ISPs with billing services on an ongoing basis while continuing to provide such services to its own ISP affiliate, SWBT gives its house brand yet another unfair advantage. None of this comports with the limited resale exception that this Commission crafted for pure wholesalers of DSL to unaffiliated ISPs in the *Second Advanced Services Order*. SWBT's conduct is thus intended, and will have the effect, of

both securing its monopoly over local services, and leveraging that monopoly into the advanced services market.

Second, SWBT violates items (ii) and (iv) of the checklist by refusing to comply with the Commission's *Line Sharing* and *Line Sharing Reconsideration Orders*. These orders require SWBT to provide line sharing on fiber-fed loops and access for line-sharing at the central office, which SWBT refuses to do. SWBT's anticompetitive restrictions on line sharing reduce the number of customers to whom CLECs can offer advanced services, degrade the quality of CLEC service, and increase CLEC costs, and the anticompetitive impact only increases as SWBT continues to extend the use of fiber in its network. Once CLECs are able economically to make use of the UNE platform, their inability to access line-sharing over fiber-fed DLC loops at the central office will significantly restrict their ability to compete with SWBT.

Part IV of these comments shows that SWBT continues to deny CLECs parity of access to its repair and maintenance systems. SWBT's LMOS records are not updated in a timely manner, preventing CLECs from reporting troubles for customers electronically at precisely the time those troubles are most likely to arise. Moreover, because SWBT's systems have not updated LMOS records correctly, SWBT's OSS performance reports have been inaccurate. Even SWBT's own "mathematical analysis" shows that SWBT's reported data fail to capture repair and maintenance discrimination. Similarly, SWBT's flow-through data for May and June 2001 show that the flow-through data that SWBT previously reported have been consistently skewed so as to overstate the degree to which CLEC orders are processed electronically.

Part V explains that SWBT has failed to meet the threshold requirements of Track A, § 271(c)(1)(A), for Arkansas. To satisfy Track A, a BOC must be providing access and

interconnection to the “network facilities” of one or more “competing providers” of telephone exchange service “to residential and business subscribers.” None of the providers on whom SWBT relies is currently offering facilities-based or UNE-based service to residential customers in Arkansas, and the statute precludes reliance on pure resellers of residential service.

Finally, Part VI sets forth the reasons why approval of the joint application would not serve the public interest. InterLATA authorization is not in the public interest if other relevant factors demonstrate either that its local markets are not open to competition or will not remain open to competition. Local residential markets in Arkansas and Missouri are not yet open to competition, both because competitors today serve only a paltry number of residential customers, and because these competitors either are exiting the local market or are in extreme financial distress. None has made investments in the Arkansas or Missouri residential markets comparable to the investments that CLECs have made to enter the Texas residential market.

In addition, SWBT’s misconduct continues to deter and block competitive entry by raising competitors’ costs and increasing uncertainty. SWBT continues to engage in trench warfare over its performance obligations, refusing to comply with the plain terms of its remedies plan, and forcing CLECs to engage in protracted litigation to enforce remedies that are supposed to be “self-executing.” It raises further obstacles by misstating performance reports, paying penalties as a cost-of-preserving a monopoly rather than fixing problems, and evading checklist obligations (such as resale of DSL) to exclude competitors.

To grant SWBT’s application now would not prompt CLECs to enter the local residential market in Arkansas and Missouri. If CLECs cannot succeed using UNE-P under the rates and conditions now prevailing in Texas, they certainly will not succeed using UNE-P under the higher rates, and with less vigorous state commission oversight, in Missouri and Arkansas.

Nor will consumers benefit from having SWBT as a long-distance provider; the decreases in long distance rates in Texas that coincided with the SWBT's interLATA authorization reflected the pass-through of reductions in access rates, and SWBT is now raising its long-distance rates in Texas with impunity. Approval of SWBT's Arkansas/Missouri application thus would simply allow SWBT, at great speed, to accomplish in those states what it is now accomplishing in Texas: raising its customers' rates because it is the only carrier able widely to provide a bundled offering of local, long distance and advanced services. To prevent this corruption of the Telecommunications Act and Section 271, the Commission should deny SWBT's application for Arkansas and Missouri.

**I. SWBT'S UNE RATES ARE NOT COST-BASED AND DO NOT SATISFY CHECKLIST ITEM TWO.**

**A. MISSOURI.**

Only three months ago SWBT withdrew its Missouri section 271 application when it became clear that SWBT could not possibly demonstrate that its Missouri UNE rates are cost-based.<sup>2</sup> In that proceeding, the DOJ and other parties demonstrated that SWBT's approved rates fall far "outside the range that the reasonable application of TELRIC principles would produce." DOJ MO Eval. at 2. The record clearly established that SWBT's massively inflated Missouri rates were based on cost studies that, by their own terms, violated fundamental TELRIC principles, including, *inter alia*, reliance on an impermissible reproduction cost approach, extremely short depreciation lives, an excessive common cost factor, and numerous clear methodological errors in the calculation of costs for the loop and switching elements.<sup>3</sup> The

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<sup>2</sup> See *Ex Parte* Letter from Priscilla Hill-Ardoin, SBC Vice President, to Magalie Roman Salas, FCC Secretary, CC Docket No. 01-88 (filed June 7, 2001).

<sup>3</sup> See *Ex Parte* Letter from David Lawson to Magalie Roman Salas, FCC Secretary, *Application of Southwestern Bell for Provision of In-Region, InterLata Services in Missouri*, CC Docket No. 01-88 (filed June 1, 2001).

record also established that SWBT was relying on an extraordinary number of “interim” rates that were not remotely forward-looking and had never even been reviewed by the MPSC. *See* DOJ MO Eval. at 19 (“[t]he large number of interim rates set . . . are troublingly high and have been left as interim for years, despite concerns having been raised that they are not forward-looking”). SWBT’s failure to meet its Checklist Item Two burden was further confirmed by the stark reality that “competitive entry using UNEs to reach residential customers is almost non-existent in [Missouri],” DOJ MO Eval. at 2, and necessarily so, given the anemic “margins” available to potential UNE-based competitors in Missouri. *See* AT&T MO Comments at 10. And SWBT could not remedy the Checklist Item Two bar to section 271 authority by unilaterally reducing its excessive UNE rates because SWBT had refused to provide the Commission and commenters with electronic access to its cost studies that would be necessary to verify that any such discounts were sufficient to offset the inflation caused by the many TELRIC violations in those cost studies. In short, SWBT’s failure to satisfy its Checklist Item 2 burden was obvious and undeniable.<sup>4</sup>

SWBT’s current section 271 application addresses *none* of these fatal flaws. The new Application defends the same flawed cost studies with the same patently inadequate platitudes. The new Application again simply ignores most of the arguments and evidence that conclusively prove the many ways in which SWBT’s cost models violated the Commission’s

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<sup>4</sup> *See, e.g., Kansas/Oklahoma 271 Order* ¶ 29 (“the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement”); *New York 271 Order* ¶ 49 (the BOC applicant must make “a *prima facie* case that it meets the requirements of a particular checklist item” and “must plead, with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met”). The United States Court of Appeals for the Eighth Circuit has held that certain of the Commission’s TELRIC rules are inconsistent with the requirements of the 1996 Act. *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8<sup>th</sup> Cir. 2000), *petition for cert. filed sub nom. Verizon Communications v. FCC*, 121 S.Ct. 877 (Oct. 4, 2000) (No. 00-511). The Eighth Circuit stayed its decision pending Supreme Court review, *see Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.* (8<sup>th</sup> Cir. Sept. 25, 2000); on January 22, 2001, certiorari was granted. *Verizon Communications, Inc. v. FCC.*, 121 S.Ct. 877, (continued)

pricing rules. The new Application still relies on an extraordinary number of interim rates. SWBT has again refused to place in the record the critical cost evidence that is in its sole control. And it remains the case that there is virtually no facilities-based residential competition in Missouri, and that SWBT's rates are far too high to allow market-wide UNE-based entry.

The only thing that has changed since June is that SWBT has now unilaterally reduced a handful of its inflated rates. SWBT now claims that these arbitrary discounts alone are sufficient to "allay any lingering concerns" about its inflated rates. Hughes MO Aff. ¶ 56. SWBT is wrong. Because SWBT has denied the Commission and commenters electronic access to its cost studies, the Commission cannot determine even the rough magnitude of the rate inflation caused by the many TELRIC violations in SWBT's cost studies. There is thus no non-arbitrary basis for the Commission to determine that SWBT's arbitrary discounts to certain of the rates is enough to bring even those rates down to lawful levels. Moreover, the serious TELRIC violations in SWBT's cost studies inflated *all* of SWBT's UNE rates, including for example, the urban zone loop rates that SWBT has not discounted at all. *See* Baranowski AR/MO Decl. ¶¶ 65-67.

But even if SWBT could somehow establish that the arbitrary 10 to 18 percent discounts to some of its approved rates offset the inflation caused by its non-TELRIC-compliant 1997 cost estimates, that would only mean that the current discounted rates would have been TELRIC-compliant in 1997. Section 271 is framed in the present tense and requires a showing that the BOC's rates comply with the checklist today.<sup>5</sup> It is beyond serious dispute that the costs of the facilities used to provide UNEs have declined dramatically during the past few years. As

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(Jan 22, 2001). The Commission has held that its TELRIC rules "remain in effect" for purposes of Section 271 applications filed during the period of the stay. *Massachusetts 271 Order* ¶ 17; *Kansas/Oklahoma 271 Order* ¶ 48.

detailed below, SWBT's Missouri cable and wire investment declined by 31 percent between 1996 and 2001, which strongly indicates that SWBT's loop costs have significantly declined since 1996. Similarly, SWBT's Missouri switching investment costs have fallen by 23 percent since 1996. Because SWBT has not reduced its UNE rates to reflect these substantial cost savings, SWBT's rates cannot possibly comply with Checklist Item Two.

It should, therefore, come as no surprise that SWBT's rates remain far too high to support mass market entry, Lieberman AR/MO Decl. ¶¶ 18-20, and that SWBT's Missouri rates continue to exceed rates in other SWBT states with similar costs. For example, SWBT's Missouri loop costs are 19 percent *lower* than those in Arkansas – the other state for which SWBT is concurrently seeking section 271 approval, but its Missouri loop rates are 7 percent *higher* than those in Arkansas. *See id.* ¶ 21. As MPSC Commissioner Gaw recently noted, it is “striking . . . [that] Missouri's rates are higher than the rates just volunteered by SWBT to Arkansas – a state that is more rural and with more difficult terrain than Missouri.”<sup>6</sup>

Based on this record, there can be no non-arbitrary finding that SWBT has satisfied its burden of proving that its rates satisfy Checklist Item 2. SWBT's burden is to prove, not merely assert, that its rates are cost-based, and SWBT's conduct in prior proceedings confirms that it is a particularly poor candidate for the “trust me” approach it urges the Commission to endorse in this proceeding.<sup>7</sup> Thus, SWBT's application should be denied.

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<sup>5</sup> See 47 U.S.C. § 271(c)(2)(A) (“such company *is* providing access and interconnection . . . [that] meets the” checklist requirements) (emphasis added).

<sup>6</sup> See Gaw Concurrence at 1-2.

<sup>7</sup> See, e.g., Ex Parte Letter from Geoffrey Klineberg, Kellogg, Huber, Hansen, Todd & Evans, to Magalie Roman Salas, Federal Communications Commission (April 13, 2001); Ex Parte Letter from John D. Lee, Comptel, to Magalie Roman Salas, Federal Communications Commission (May 21, 2001) (“this is not the first time SBC has had difficulty with candor to the FCC”); Order On Review, *SBC Communications Inc., Apparent Liability For Forfeiture*, File No. EB-00-IH-0432, NAL/Acct. No. 200132080011 (May 29, 2001) (fining SBC \$88,000 because SBC “use[d] misleading statistics and . . . comparisons . . . [and has] significantly overstated the accuracy of its findings”); Kenneth Hoexter, *SBC Ignores Rules, Pays 4th Fine*, Merrill Lynch Global Securities Research, Apr. 13, (continued)



**1. SWBT's Limited Rate Reductions Are Patently Insufficient To Offset The Rate Inflation Caused By The Many TELRIC Violations In SWBT's Cost Studies**

SWBT's arbitrary reductions to some of its UNE rates are insufficient to correct the defects in its original rates. SWBT's discounts apply to only a handful of rate elements, specifically to "*certain* loops," "*certain* signaling, switching, and transport rate elements," and nonrecurring charges for analog line port. *See* SWBT AR/MO Br. at 58 (emphasis added); *see also* Baranowski AR/MO Decl. ¶¶ 65-67.<sup>8</sup> The rates for the rest of the UNE elements are the same as those in SWBT's original flawed application. As detailed below, the many TELRIC violations in SWBT's cost studies inflated *all* of SWBT's UNE rates. *See* Baranowski AR/MO Decl. ¶¶ 66. Consequently, SWBT's arbitrary rate reductions to only *some* of its UNE rates could not remedy the problems that required SWBT to withdraw its original application. *See id.*

Even for those rates that SWBT has reduced, there is no basis to conclude that those rate discounts are sufficient to overcome the massive inflation caused by the serious TELRIC violations that have been identified by the DOJ and other parties. *See, e.g.,* DOJ MO Eval. at 14-19. Because SWBT has denied the Commission and commenters electronic access to its cost studies, *see, e.g.,* WorldCom MO Comments at 4-6, AT&T MO Reply at 23-25, there is no way for the Commission or commenters to determine the amount that SWBT's Missouri rates are inflated over cost-based rates. *See* DOJ MO Eval. at 14; Baranowski AR/MO Decl. ¶ 67. And without knowing what rates (or range of rates) a reasonable application of TELRIC

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2001 (noting that SBC has paid \$23 million in fines for violations of Commission Orders and "prefer[s] to pay fines as a part of business, compared [to] . . . open[ing] the markets to local competition"); *Ex Parte Letter* from Richard Young to Magalie Roman Salas, Secretary, at 5-8 (May 24, 2001) (demonstrating that SWBT misrepresented the procedures it has undertaken to fix its LMOS systems).

<sup>8</sup> Notably, SWBT's rate discounts are strategically targeted so that no rate discounts are offered in zones where competition is most likely to occur. For instance, SWBT's offers no discounts to loop rates in urban zones. *See* Baranowski AR/MO Decl. ¶ 65.